

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA

JOSE ROBERT GUTIERREZ,

No. C 08-3286 WHA (PR)

Petitioner,

ORDER TO SHOW CAUSE

v.

M. S. EVANS, Warden,

Respondent.

Petitioner, a California prisoner currently incarcerated at Salinas Valley State Prison, has filed a pro se petition for a writ of habeas corpus pursuant to 28 U.S.C. § 2254. He has paid the filing fee.

Venue is proper because the conviction was obtained in Monterey County, which is in this district. *See* 28 U.S.C. § 2241(d).

DISCUSSION

A. STANDARD OF REVIEW

This court may entertain a petition for writ of habeas corpus "in behalf of a person in custody pursuant to the judgment of a State court only on the ground that he is in custody in violation of the Constitution or laws or treaties of the United States." 28 U.S.C. § 2254(a); *Rose v. Hodges*, 423 U.S. 19, 21 (1975). Habeas corpus petitions must meet heightened pleading requirements. *McFarland v. Scott*, 512 U.S. 849, 856 (1994). An application for a federal writ of habeas corpus filed by a prisoner who is in state custody pursuant to a judgment of a state

1 court must “specify all the grounds for relief which are available to the petitioner ... and shall
2 set forth in summary form the facts supporting each of the grounds thus specified.” Rule 2(c) of
3 the Rules Governing § 2254 Cases, 28 U.S.C. foll. § 2254. “[N]otice’ pleading is not
4 sufficient, for the petition is expected to state facts that point to a ‘real possibility of
5 constitutional error.’” Rule 4 Advisory Committee Notes (quoting *Aubut v. Maine*, 431 F.2d
6 688, 689 (1st Cir. 1970). “Habeas petitions which appear on their face to be legally insufficient
7 are subject to summary dismissal.” *Calderon v. United States Dist. Court (Nicolaus)*, 98 F.3d
8 1102, 1108 (9th Cir. 1996) (Schroeder, J., concurring).

9 **B. CLAIMS**

10 A jury convicted petitioner of one count of first degree murder and two counts of
11 attempted deliberate and premeditated murder. With sentencing enhancements, he was
12 sentenced to prison for 125 years to life. His conviction was affirmed on direct appeal by the
13 California Court of Appeal, and the California Supreme Court denied review.

14 As grounds for federal habeas relief, petitioner asserts that: (1) his due process rights
15 were violated when the trial court refused to unseal certain documents for use by the defense;
16 (2) his due process rights were violated by the trial court’s refusal to hold a hearing on revealing
17 the identity of jurors to allow him to investigate possible misconduct, and by the jury’s
18 misconduct in considering matters not in evidence; and (3) his due process rights were violated
19 when the trial court admitted evidence of gang activity.

20 These claims are sufficient to require a response.

21 **CONCLUSION**

22 1. The clerk shall mail a copy of this order and the petition with all attachments to the
23 respondent and the respondent's attorney, the Attorney General of the State of California. The
24 clerk shall also serve a copy of this order on the petitioner.

25 2. Respondent shall file with the court and serve on petitioner, within sixty days of
26 service of this order, an answer conforming in all respects to Rule 5 of the Rules Governing
27 Section 2254 Cases, showing cause why a writ of habeas corpus should not be granted.
28 Respondent shall file with the answer and serve on petitioner a copy of all portions of the state

1 trial record that have been transcribed previously and that are relevant to a determination of the
2 issues presented by the petition.


3 If petitioner wishes to respond to the answer, he shall do so by filing a traverse with the
4 court and serving it on respondent within thirty days of service of the answer.

5 3. Respondent may file a motion to dismiss on procedural grounds in lieu of an answer,
6 as set forth in Rule 4 of the Rules Governing Section 2254 Cases. If respondent files such a
7 motion, petitioner shall file with the court and serve on respondent an opposition or statement of
8 non-opposition within thirty days of receipt of the motion, and respondent shall file with the
9 court and serve on petitioner a reply within 15 days of receipt of any opposition. If a motion is
10 filed it will be ruled upon without oral argument, unless otherwise ordered.

11 4. Petitioner is reminded that all communications with the court must be served on
12 respondent by mailing a copy of the document to respondent's counsel. Papers intended to be
13 filed in this case should be addressed to the clerk rather than to the undersigned. Petitioner also
14 must keep the court informed of any change of address by filing a separate paper with the clerk
15 headed "Notice of Change of Address," and comply with any orders of the court within the time
16 allowed, or ask for an extension of that time. Failure to do so may result in the dismissal of this
17 action for failure to prosecute pursuant to Federal Rule of Civil Procedure 41(b). *See Martinez*
18 *v. Johnson*, 104 F.3d 769, 772 (5th Cir. 1997) (Rule 41(b) applicable in habeas cases).

19 **IT IS SO ORDERED.**

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21 Dated: August 1, 2008.



WILLIAM ALSUP
UNITED STATES DISTRICT JUDGE

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UNITED STATES DISTRICT COURT
FOR THE
NORTHERN DISTRICT OF CALIFORNIA

JOSE R. GUTIERREZ,
Plaintiff,

Case Number: CV08-03286 WHA

CERTIFICATE OF SERVICE

v.

MS. EVANS et al,
Defendant.

_____/

I, the undersigned, hereby certify that I am an employee in the Office of the Clerk, U.S. District Court, Northern District of California.

That on August 1, 2008, I SERVED a true and correct copy(ies) of the attached, by placing said copy(ies) in a postage paid envelope addressed to the person(s) hereinafter listed, by depositing said envelope in the U.S. Mail, or by placing said copy(ies) into an inter-office delivery receptacle located in the Clerk's office.

Jose Robert Gutierrez F-19152
Salinas Valley State Prison
A4-204
P.O. Box 1050
Soledad, CA 93960-1050

Attorney General's Office
455 Golden Gate Ave
San Francisco, CA 94102

Dated: August 1, 2008

Richard W. Wieking, Clerk
By: D. Toland, Deputy Clerk